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Supreme Court, U.S.
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No. 91-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM R. FINCHER,

Petitioner,

V.

B&D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

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May 26, 1992

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QUESTIONS PRESENTED

Texas law provides that, in a suit against a partnership, service of process on a member of the partnership authorizes a judgment against the partnership and the partner served. V.T.C.A., Civil Practice & Remedies Code § 17.022 (Vernon 1986). The decision below construed § 17.022 to authorize a judgment against a partner who, although served with process for the partnership, was not named as a defendant individually until six weeks after trial.

The questions presented are as follows:

1. Does the Fourteenth Amendment allow a state court to enter a judgment against a person who is not named as a defendant in an action until after trial?

2. Does § 17.022, as construed and applied to permit a judgment to be entered against a partner who is not timely named as a defendant, violate the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner is William R. Fincher, in his capacity as an individual. The respondents are B&D Air Conditioning and Heating Company and Donald L. Partridge.

The parties to the proceedings in the Court of Appeals for the First District of Texas were as follows:

(i) the appellants were William R. Fincher, individually (the petitioner herein), William R. Fincher, Trustee, and Yellow Ribbon Enterprises.

(ii) the appellees were B&D Air Conditioning and Heating Company and Donald L. Partridge, the respondents herein.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM R. FINCHER,

Petitioner,

v.

B&D AIR CONDITIONING AND HEATING COMPANY AND DONALD L. PARTRIDGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Petitioner William R. Fincher respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the First District of Texas, entered in the above-entitled proceeding on August 29, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the First District of Texas is reported, in part, at 816 S.W.2d 509, and is set forth in full in the Appendix hereto, at p. A1-A28.

The judgment of the 215th Judicial District Court of Harris County, Texas was not accompanied by a written opinion and is not reported. The trial court's oral ruling and written Findings of Fact and Conclusions of Law, and the judgment entered by the trial court, are set forth in the Appendix hereto, at p. B1-B26.

JURISDICTION

The opinion below, and the judgment of the Court of Appeals for the First District of Texas, were entered on August 29, 1991. The Petitioner, and others, timely filed a Motion for Rehearing, which was overruled on September 26, 1991. The Petitioner, and others, thereafter timely filed an Application for Writ of Error in the Supreme Court of Texas. The Application for Writ of Error was denied by the Supreme Court of Texas on February 26, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the construction and application of section 17.022 of the Texas Civil Practice and Remedies Code, which provides as follows: "Citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served." V.T.C.A., Civil Practice & Remedies Code § 17.022 (Vernon 1986).

The case also involves section one of the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part, as follows: "[N]or shall any State deprive any person of . . . property, without due process of law. . . ." U.S.C.A. Const. Amend. 14, § 1 (West 1987).

STATEMENT OF THE CASE

1. This case began as an action by a subcontractor, Mischer Enterprises, Inc., to collect payment for materials furnished

in the rebuilding of an apartment complex. Among the defendants named in the lawsuit were the Respondents; a Texas general partnership known as Yellow Ribbon Enterprises; and "William R. Fincher, Trustee." The general partners of Yellow Ribbon Enterprises, as found by the lower courts, were William R. Fincher, Trustee for a Texas corporation (i.e., "William R. Fincher, Trustee"), and William R. Fincher, individually. William R. Fincher, individually, was not named as a defendant.

A citation was addressed to, and served upon, "Yellow Ribbon Enterprises . . . by serving William R. Fincher, its general partner." A separate citation was addressed to, and served upon, "William R. Fincher." Again, however, the lawsuit did not name William R. Fincher, individually, as a defendant. Accordingly, the petition was answered, and defended, only by Yellow Ribbon Enterprises and William R. Fincher,

Trustee. No answer was filed, and no appearance was ever made in the case, by William R. Fincher, individually.

Shortly after the action was commenced, the Respondents filed a cross-action against the remaining defendants, including Yellow Ribbon Enterprises and William R. Fincher, Trustee. The cross-action did not name William R. Fincher, individually, as a defendant. Thus, as was the case with the claims raised by the plaintiff, the Respondents' cross-action was defended only by Yellow Ribbon Enterprises and William R. Fincher, Trustee. William R. Fincher, individually, made no appearance or defense with respect to the Respondents' cross-claims.

2. A bench trial was held on June 16, 1989. William R. Fincher, Trustee, appeared (and testified) as a defendant and cross-defendant. Yellow Ribbon Enterprises also appeared as a defendant and cross-

defendant. The court and the other parties were expressly advised, however, that Fincher was appearing only in the capacity in which he had been sued, i.e., as a Trustee, and not individually. At the end of the trial, the trial court announced that judgment in favor of the plaintiff would be given against Respondent B & D Air Conditioning and Heating Company; and that judgment on the Respondents' cross-action would be given against Yellow Ribbon Enterprises. The trial court did not mention granting judgment against William R. Fincher in any capacity.

On July 31, 1989, approximately one and one-half months after the trial, the Respondents filed a "First Trial Amendment to Original Cross-Petition," stating that the claims in their cross-action were alleged "against William R. Fincher, Individually, as well as in his capacity as Trustee." On this basis, the Respondents

requested entry of a judgment not only against Yellow Ribbon Enterprises, but also against William R. Fincher, both individually and as Trustee. A motion to strike the amended pleading was filed on August 9, 1989, but no ruling thereon was ever made. Instead, on August 31, 1989, the trial court signed a judgment that, among other things, granted judgment on the Respondents' cross-claims against William R. Fincher, individually. Thus, despite not being named as a cross-defendant in his individual capacity until six weeks after the trial, the Petitioner was saddled with a judgment on the Respondents' cross-action both individually, and as Trustee.

The trial court signed Findings of Fact and Conclusions of Law on September 28, 1989. A motion was then filed in the trial court seeking either a new trial, or amendment of the judgment to delete any relief against William R. Fincher, individu-

ally. See Defendant Fincher's Motion for New Trial or, Alternatively, Motion to Amend Judgment. Among the arguments raised in that motion were claims that the trial court had not acquired jurisdiction over, and therefore could not enter judgment against, Fincher in his individual capacity; and that the entry of judgment against Fincher, individually, violated Fincher's due process rights under section one of the Fourteenth Amendment. Thus, the Petitioner's federal due process claims were timely and properly presented to the trial court. As was its prerogative, the trial court did not rule on the motion for new trial, and the motion was overruled by operation of law in due course.*/

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*/ Under Texas law, if a motion for new trial "is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period." Tex. R. Civ. P. 329b(c).

3. On appeal to the Court of Appeals for the First District of Texas, the Petitioner's due process claims again were included among the arguments raised. See Brief of Appellants, at 7-20. Specifically, the Petitioner argued, inter alia, that the trial court had not acquired jurisdiction over him in his individual capacity; that a valid judgment could not be entered against a person not named as a defendant; and that the trial court's entry of judgment against Fincher in his individual capacity violated Fincher's Fourteenth Amendment due process rights. Thus, the Petitioner's federal due process claims were timely and properly presented to the Court of Appeals for the First District of Texas.

The Court of Appeals, in a 2-1 decision, affirmed the judgment against the Petitioner. In so doing, the Court identified the "main question presented . . . [as] whether a partner in a Texas

general partnership, although not named individually as a defendant in a petition, can be held individually liable because he was served with citation on behalf of the partnership." Appendix, p. A2 (emphasis in original). Answering this question in the affirmative, the Court of Appeals held that judgment on the Respondents' cross-claims could validly be entered against Fincher in his individual capacity.

To reach this result, the Court of Appeals first observed that, under Texas law, the partners in a partnership are jointly and severally liable for all partnership debts. The Court then turned to section 17.022 of the Texas Civil Practice and Remedies Code, which provides that "[s]ervice on one member of a partnership authorizes a judgment against the partnership and the partner actually served." V.T.C.A., Civil Practice & Remedies Code § 17.022 (Vernon 1986). From this,

the Court concluded that any partner who is served with process in a suit against a partnership is "on notice" that he will be personally liable for any judgment rendered against the partnership. Thus, a partner who is served with process need not be named as a defendant individually, because section 17.022 allows a judgment to be entered against any partner served. Appendix, p. A8-A10.

Applying its analysis, the Court of Appeals held that the judgment entered against the Petitioner was proper. The Court acknowledged that "William R. Fincher, individually," was not named as a defendant with respect to the Respondents' cross-claims; and that the only partner of Yellow Ribbon Enterprises named anywhere in the lawsuit was "William R. Fincher, Trustee." But because the Petitioner had been served with process as a general partner of Yellow Ribbon Enterprises, the

judgment against him individually was permitted to stand. Appendix, p. A14-A15. Thus, the appellants' first point of error, which contained the Petitioner's jurisdictional and due process claims (both state and federal), was overruled by the Court of Appeals. Appendix, p. A17.

Justice Mirabal dissented. In her view, "the trial court erred when it granted judgment against Fincher, individually, when Fincher was not named individually as a defendant until after the trial was completed." Appendix, p. A26 (emphasis in original). Justice Mirabal recognized that all partners are jointly and severally liable for the debts of a partnership, and that citation served on a member of a partnership generally authorizes judgment against the partnership and the partner actually served. At the same time, she found no authority holding that a partner not named in a lawsuit as a

defendant can have a valid judgment entered against him. Appendix, p. A27-A28. In addition, Justice Mirabal stated that she did not believe that a reasonable person would be put on notice that he was being sued individually when served with a citation addressed to a partnership, along with a petition that did not name him, individually, as a defendant. Appendix, p. A25-A26. Accordingly, the dissent would have sustained the first point of error.

As noted above, the Petitioner's jurisdictional and due process claims were set forth in the first point of error presented to the Court of Appeals. In overruling that point of error, the Court of Appeals held that the Petitioner, "although not named as a defendant individually, when served as a general partner for Yellow Ribbon, was before the trial court in his capacity as general partner and, once the partnership liability

partnership liability was established, a judgment could be taken against him individually." Appendix, p. A15. The Petitioner's jurisdictional and due process claims were necessarily rejected by this holding and the analysis giving rise thereto.

4. The appellants timely filed a motion for rehearing. That motion again asserted the Petitioner's due process claims, and further noted that the Court of Appeals' construction and application of section 17.022 was not consistent with the requirements of due process. See Appellants' Motion for Rehearing, at 3-7. The motion for rehearing was overruled, without comment, on September 26, 1991. Appendix, p. C1.

The Petitioner thereafter sought discretionary review of the Court of Appeals' decision by the Supreme Court of Texas. The Petitioner's jurisdictional and

Fourteenth Amendment due process challenges to the entry of judgment against him were raised once again, as was the argument that, as construed and applied by the Court of Appeals, section 17.022 was not consistent with the requirements of due process. See Application for Writ of Error, at 7-19. Thus, these claims were timely and properly presented to the Supreme Court of Texas. The Application for Writ of Error was denied on February 26, 1992, with the notation "Writ Denied." Appendix, p. D1.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION CONFLICTS, DIRECTLY OR IN PRINCIPLE, WITH THIS COURT'S FOURTEENTH AMENDMENT DUE PROCESS DECISIONS.

Throughout the pretrial and trial stages of this action, the only defendants named on the Respondents' cross-claims were Yellow Ribbon Enterprises and William R. Fincher, Trustee. The Petitioner was not

named as a cross-defendant in his individual capacity until six weeks after the trial was concluded. Thus, the Petitioner was given no timely indication, let alone placed on fair notice, that a judgment would be sought against him individually. As a result, the Petitioner did not file pleadings in his individual capacity, did not appear or defend at trial in his individual capacity, and was not represented by counsel in his individual capacity. In short, having not been sued individually by anyone in the matter, the Petitioner simply did not participate in the case in his capacity as an individual.

The Respondents filed a post-trial "trial amendment," which for the first time named the Petitioner as a cross-defendant in his individual capacity. The trial court permitted the amendment and, without further proceedings, entered judgment against the Petitioner both individually and as Trustee.

The Court of Appeals affirmed the judgment, holding that the Petitioner did not need to be named as a defendant individually in order for a judgment to be entered against him in that capacity. This decision, and the entry of judgment against the Petitioner, individually, are inconsistent with the requirements of the Fourteenth Amendment and wholly at odds with this Court's due process jurisprudence. The decision below therefore deserves and requires review by this Court.

At a minimum, due process requires notice of the pendency of a proceeding and an opportunity for those whose liberty or property interests may be adversely affected thereby to be heard. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the

action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Moreover, this Court's "cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn." Lankford v. Idaho, 500 U.S. __, __ n.22, 111 S.Ct. 1723, 114 L.Ed. 2d 173, 188 (1991). Failure to give the requisite notice "violates the most rudimentary demands of due process of law." Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 85 (1988), quoting Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

In this case, the Petitioner was given no timely notice by the Respondents' pleadings that a judgment on their cross-action would be sought against him individually. Indeed, the Petitioner was not named as a cross-defendant individually

until six weeks after the trial was concluded. Thus, the simple fact is that the Petitioner was not adequately apprised of the pendency of any action against him in his individual capacity. Nor, once the Respondents' post-trial "trial amendment" was filed, was the Petitioner given any opportunity to be heard with respect to the claims belatedly advanced against him in his individual capacity. The trial court's entry of a judgment under such circumstances constitutes a classic, textbook violation of the Petitioner's Fourteenth Amendment due process rights.

The Court of Appeals viewed the matter differently, holding that the Petitioner did not need to be named as a defendant individually in order for a judgment to be entered against him in that capacity. Having been served with process on behalf of the partnership under section 17.022, the Petitioner was deemed to be "on notice"

that he would be personally liable for any judgment rendered against the partnership. Appendix, p. A10. On this basis, the Court of Appeals held that section 17.022 allows a judgment to be entered against any partner served, whether or not named as a defendant individually in the action. This holding is inconsistent with this Court's decisions in at least two respects.

First, a person who is not designated as a party to a lawsuit cannot be bound by a judgment that results from the proceeding. See, e.g., Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process."); Hansberry v. Lee, 311 U.S. 32, 40 (1940). "The consistent constitutional rule has been that a court has no power to

adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." Zenith Radio Corporation v. Hazeltine Research, Inc., supra, at 110. Thus, the Court of Appeals' holding that the Petitioner did not need to be named as a defendant individually to be subject to entry of a judgment in that capacity is fundamentally incorrect. The trial court was without power to enter a judgment against any person over whom it had no personal jurisdiction, and any judgment so entered was void as a matter of law.

Second, the "notice" supplied by the receipt of service under section 17.022 is not adequate to apprise a partner who is not named as a defendant individually that the proceeding may nevertheless encompass adjudication of his individual liability. To the contrary, such circumstances are apt to be affirmatively misleading to the recipient of the service. As the dissent

suggested below, a reasonable person is simply not likely to be placed on notice that he is being sued individually in this situation. Appendix, p. A25 - A26. In short, the "notice" provided by receipt of service under section 17.022 is not reasonably calculated, under the circumstances, to apprise a partner not named in the pleadings as a defendant individually that he is, in fact, a defendant nonetheless. Such "notice" is not constitutionally sufficient to satisfy the due process requirements of the Fourteenth Amendment. Accordingly, as construed and applied by the Court of Appeals in the decision below, section 17.022 is unconstitutional.

For these reasons, the judgment entered against the Petitioner in his individual capacity is constitutionally infirm. The decision of the Court of Appeals perpetuates, and exacerbates, that infirmity. The decision below is radically

inconsistent with the notice requirements of the Fourteenth Amendment, and is in fundamental conflict with this Court's procedural due process decisions. See, e.g., Peralta v. Heights Medical Center, Inc., supra; Armstrong v. Manzo, supra; Mullane v. Central Hanover Bank & Trust Co., supra. Review by this Court is necessary and warranted to eliminate the conflict presented by the decision below.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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William R. FINCHER, Individually and as Trustee, and Yellow Ribbon Enterprises, Appellants,

v.

B & D AIR CONDITIONING AND HEATING COMPANY and Donald L. Partridge, Appellees.

No. 01-89-01246-CV.

Court of Appeals of Texas, Houston (1st Dist.).

Aug. 29, 1991.

Rehearing Overruled Sept. 26, 1991.

Published in Part Pursuant to Tex.R.App.P. 90.

[SUMMARY AND HEADNOTES OMITTED]

Before MIRABAL and WILSON, JJ., and FRANK C. PRICE,[1] Former Justice (Sitting by Assignment).

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[1] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

OPINION

PRICE, Assigned Former Justice.

The main question presented in this appeal is whether a partner in a Texas general partnership, although not named *individually* as a defendant in a petition, can be held individually liable because he was served with citation on behalf of the partnership.

The plaintiff in the trial court was a subcontractor who sued to collect for materials furnished to rehabilitate an apartment complex. The plaintiff sued the owners of the apartment, the original contractor, and the subcontractor with whom plaintiff had contracted.

The defendant subcontractor filed a cross action against the defendant original contractor and the defendant apartment owners. This appeal arises out of the judgment, after a bench trial, in favor of the defendant/cross-plaintiff subcontractor

(appellees) against the apartment owners (appellants).

One owner of the apartments was appellant, Yellow Ribbon Enterprises ("Yellow Ribbon"). Yellow Ribbon was a Texas general partnership composed of two partners, William R. Fincher, individually, and William R. Fincher, Trustee for a Texas corporation. William R. Fincher ("Fincher") is an appellant in both capacities.

THE ORIGINAL PETITION AND SERVICE OF CITATION

The Plaintiff's original petition named as defendants "Yellow Ribbon Enterprises and William R. Fincher, *Trustee*," among others. The petition states that Yellow Ribbon is a partnership that can be served with process "by serving its general partner, William R. Fincher." The petition also states, in a separate paragraph, that "William R. Fincher may be served with process" at his place of

business. The petition alleges that "Yellow Ribbon Enterprises and William Fincher are owners of the real property upon which the improvements were made," and that Yellow Ribbon acted by and through "its general partner, William Fincher." In the prayer, the petition seeks judgment generally against "the Defendants, jointly and severally."

The citation served on Yellow Ribbon Enterprises was addressed "TO: Yellow Ribbon Enterprises, a limited partnership, by serving William R. Fincher, its general partner." The citation served on Fincher was addressed "To: William R. Fincher." The officer's return on each citation shows service was had on "William R. Fincher."

An original answer was filed by Defendants Yellow Ribbon Enterprises and "William R. Fincher, *Trustee*."

THE CROSS ACTION

Appellees' cross-petition named as cross-defendants "Yellow Ribbon Enterprises and William R. Fincher, *Trustee*," as well as others. The petition states an address at which "Yellow Ribbon Enterprises and William R. Fincher may be served with process." The prayer for relief seeks judgment generally against "the cross-defendants, and each of them."

In response, Yellow Ribbon and "William R. Fincher, Trustee," filed a cross-action against appellees.

THE TRIAL

At the start of the trial, appellants' counsel stated on the record that Mr. Fincher was appearing as trustee only, not individually. Toward the end of the trial, the following transpired:

> [By Appellees' Counsel]: Unless Mr. Fincher is trying to be here only as a trustee of some sort, and I think we have established, now, that he, individually, was one of the partners-a General Partner-of the owners of the property and may be held personally

> liable, irrespective of a claim of some trustee position, which he's trying to hide behind, that's irrelevant.
>
> [By Appellants' Counsel]: That's not true. Mr. Fincher was filed on as William R. Fincher, Trustee.
>
> [By Appellees' Counsel]: Q. You were?
>
> [By Fincher]: A. Yes, sir, I was never served, individually.

At the close of evidence, on June 16, 1989, the trial court announced from the bench that he was granting judgment "for B & D Air Conditioning against Yellow Ribbon"; the judge did not mention granting judgment against Fincher in any capacity.

On July 31, 1989, one and one-half months after the trial, appellees filed a "First Trial Amendment to Original Cross Petition," stating that all of their claims in their cross action were being alleged "against William R. Fincher, Individually as well as in his capacity as Trustee."

On August 9, 1989, Defendants Yellow Ribbon and "William R. Fincher, Trustee,"

filed a motion to strike appellees' trial amendment claiming that it "operates as a surprise to Defendants in that he is attempting to add a new party, without the allowance of time to prepare for said amended pleading...." Additionally, the motion states that Fincher, individually, "is not represented by counsel below and was not represented in said capacity in the above proceeding due to the surprise." Finally, the motion states that the attempt by appellees to bring in a new party states no excuse or explanation for appellees' delay and lack of diligence in bringing in a new party, in that "this cause of action was commenced on July 12, 1983 and far exceeds the statute of limitations for adding new parties to pleadings per Rules 37 and 38, T.R.C.P." The motion concludes by asking that, if the Court allows Fincher to be added as a party in his individual capacity, the Court reopen the trial on the

merits and allow Fincher ample time to prepare for the trial amendment.

On August 31, 1989, two and one-half months after the trial ended, the trial court signed the judgment, which recites specifically that the court grants appellees "leave to make a trial amendment to seek recovery on their claims against William R. Fincher, individually as well as Trustee." The judgment grants relief against Fincher, individually and as Trustee. The trial court overruled the motion for new trial or, alternatively, to amend judgment, to delete relief against Fincher, individually.

In point of error one, Yellow Ribbon and Fincher assert the trial court erred in awarding judgment against Fincher in his individual capacity.

[1,2] The Texas Uniform Partnership Act, also known as TUPA, is codified in TEX.REV.CIV.STAT.ANN. art. 6132b, § 1 (Vernon

1970), and is applicable to all partnerships regardless of when they came into existance [sic]. *Austin v. Truly*, 721 S.W.2d 913, 921-22 (Tex.App.-Beaumont 1986), *aff'd*, 744 S.W.2d 934 (Tex.1988). Section 15 of the Act states:

> All partners are liable jointly and severally for all debts and obligations of the partnership including those under Sections 13 and 14.

TEX.REV.CIV.STAT.ANN. art. 6132b, § 15 (Vernon 1970). The comment following section 15 states that the Texas section differs from the national act in that it makes *all* civil liability joint and several, as opposed to just contractual. The liability of the partners is in addition to the liability of the partnership itself, and suits may be brought in the name of the firm, with service on one partner. TEX.REV.CIV.STAT.ANN. art. 6132b, § 15 comment (Vernon 1970).

[3,4] Section 17.022 of the Texas Civil Practice and Remedies Code, entitled "Service on Partnership," states: "Service on one member of a partnership authorizes a judgment against the partnership and the partner actually served." TEX.CIV.PRAC. & REM.CODE ANN. § 17.022 (Vernon 1986). Partners who are served are on notice that they will be personally liable for any judgment entered against the partnership. Their liability is derivative, and they need not be named as defendants individually. This is the plain meaning of the language of these statutes.

[5] The petition alleged a cause of action against the partnership. The appellants never denied the partnership status, thus the admission of its existence could not be controverted at trial. *See Washburn v. Krenek*, 684 S.W.2d 187, 191 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.); TEX.R.CIV.P. 93(5). Once

liability is established against the partnership, the joint and several liability of each individual partner follows as a matter of law, and section 17.022 allows a judgment to be entered against any partner served.

We agree with the dissent that the better practice is to name the partnership and each individual partner as a defendant in the suit. The dissent cites a case from this Court for the proposition that "[a] petition against a partnership *should* state the names of all the partners for judgments to be obtained against them individually." *Texaco, Inc. v. Wolfe*, 601 S.W.2d 737, 740 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.) (emphasis added). However, the holding in *Texaco, Inc.* does not say that a suit against a partnership must name the partners individually as defendants before a judgment can be obtained against them.

In *Texaco, Inc.*, the petition alleged recovery against the partners, jointly and severally, in their individual capacities, without making the partnership a party to the suit. A default judgment was entered against one partner, and the jury found "nothing" owed individually by the other partner, Wolfe. On the motion for rehearing, Texaco asserted it was entitled to judgment against Wolfe because he was a partner in the partnership; the evidence at trial raised partnership liability; and the case was also tried on that theory. 601 S.W.2d at 741-42.

This Court said that in order to be entitled to an individual judgment against Wolfe as a partner of the partnership, Texaco had to allege and prove a cause of action against the partnership, and then prove Wolfe was a partner. Texaco had not pled the liability of the partnership; therefore, no judgment could be entered

against the partnership. If Texaco had relied on a partnership theory for its recovery, "[i]t would have been necessary to require the trial court to instruct the jury on the law of partnership in order to fix Charles R. Wolfe's derivative liability. No such instruction was requested or given." *Id.* Therefore, no judgment could be entered against Wolfe individually, as a partner.

In the present case, the petition alleged a cause of action against the partnership. Appellants never denied the partnership status, thus the admission of its existence could not be controverted at trial. *See Washburn v. Krenek*, 684 S.W.2d 187, 191 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.); TEX.R.CIV.P. 93(5). Once liability is established against the partnership, the joint and several liability of each individual partner follows as a matter of law, and

section 17.022 allows a judgment to be entered against any partner served.

Appellees named Fincher as a defendant, in the capacity of "Trustee." The petition also alleged Fincher was a general partner of Yellow Ribbon. The evidence showed that Yellow Ribbon was a Texas general partnership composed of two partners, Fincher, individually, and Fincher as Trustee for a corporation. The only *partner* named as a defendant in appellee's petition was "Fincher, Trustee." But Fincher was served with citation, both as general partner and as William Fincher.

The factual allegations in the pleadings state, and the proof showed, that Fincher was a general partner of Yellow Ribbon, that Yellow Ribbon and Fincher owned the involved apartment complex, and that Fincher made certain representations and agreements. Fincher signed the contracts for Yellow Ribbon; he signed the

check to the appellees; and he had personal knowledge of all the events involved in the lawsuit. Yellow Ribbon acted by and through Fincher.

We hold that Fincher, although not named as a defendant individually, when served as general partner for Yellow Ribbon, was before the trial court in his capacity as general partner and, once the partnership liability was established, a judgment could be taken against him individually.

Appellees did file a trial amendment before the judgment was signed, one and one-half months *after* the trial. By the trial amendment, appellees sought to add Fincher as a party defendant in his individual capacity. The judgment, signed two and one-half months after the trial, specifically granted appellees leave to file the trial amendment and granted judgment against Fincher, individually.

[6] Trial amendments are alterations in, or additions to, pleadings permitted to correct errors or supply omissions discovered during the trial. TEX.R.CIV.P. 66; 2 R. MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 8.07 (rev. 1982). A trial amendment may be filed only with leave of court, and the request for leave is addressed to the trial court's sound discretion, its ruling being reversible only on a showing of abuse. *Wendell v. Central Power & Light Co.*, 677 S.W.2d 610, 617 (Tex.App.-Corpus Christi 1984, writ ref'd, n.r.e.); MCDONALD, § 8.07.

[7, 8] The trial court may properly allow the amendment of pleadings to add a party *plaintiff* after the trial, but before entry of judgment in favor of the added plaintiff. *Lloyd's of London v. Walker*, 716 S.W.2d 99, 103-104 (Tex.App.-Dallas 1986, writ ref'd n.r.e.); *International Life Ins. Co. v. Herbert*, 334 S.W.2d 525,

531 (Tex.Civ.App.-Waco 1960, writ ref'd n.r.e.). Appellees have not cited any cases, and we have found none, that condone the entry of judgment *against* a party who made no appearance in the case and was not named as a defendant until after the trial concluded. However, because it was not necessary to name Fincher individually, we hold that the trial court did not abuse its discretion in allowing the trial amendment.

Therefore, we overrule appellants' first point of error.

The discussion of the remaining points of error does not meet the criteria for publication, TEX.R.APP.P. 90, and is thus ordered not published. The judgment is affirmed. [*]

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[*] The remaining portion of the majority opinion was not published and is not reported, and is therefore set forth in brackets. The dissenting opinion (Mirabal, J.) was published, and is set forth following the majority opinion, at pages A24 - A28.

[In their second point of error, appellants contend there was no evidence to support the trial court's finding of fact number 11, that appellants fraudulently induced appellees into executing a release. In their third point of error, appellants assert the trial court erred in holding that appellants were not released from all liability arising out of appellees' claims.

On appeal, findings of fact in a bench trial have the same force and effect as jury findings upon special issues. *IFG Leasing Co. v. Ellis*, 748 S.W.2d 564, 566 (Tex. App.--Houston [1st Dist.] 1988, no writ); *City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 395 (Tex. Civ. App.--Houston [14th Dist.] 1977, writ ref'd n.r.e.). Findings of fact are not conclusive, however, when a complete statement of facts appears in the record. *Middleton v. Kawasaki Steel Co.*, 687 S.W.2d 42, 44 (Tex. App.--Houston [14th

Dist.] 1985, *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985). In addressing a "no evidence" point of error, the appellate court must view the evidence in the light most favorable to the trial court's findings, considering only the evidence and inferences that support the finding. *Glover v. Texas Gen. Indem. Co.*, 619 S.W. 400, 401 (Tex. 1981); *Mediacomp v. Capital Cities Communication*, 698 S.W.2d 207, 210 (Tex. App.--Houston [1st Dist.] 1985, no writ). If there is probative evidence, more than a scintilla, to support the finding, a "no evidence" argument should be overruled. *Pool Co. v. Salt Grass Exploration, Inc.*, 681 S.W.2d 216, 220 (Tex. App.--Houston [1st Dist.] 1984, no writ).

The trial court's finding of fact number 11 reads:

> 11. WILLIAM R. FINCHER and YELLOW RIBBON ENTERPRISES falsely represented to B & D AIR CONDITIONING AND HEATING COMPANY that B & D AIR CONDITIONING AND

HEATING COMPANY would be paid in full TWENTY-EIGHT THOUSAND FOUR HUNDRED TEN AND 40/100 DOLLARS ($28,410.40) due to them but that in order for WILLIAM R. FINCHER to obtain the monies necessary to make such payment B & D AIR CONDITIONING AND HEATING COMPANY would have to sign a release in advance, which ROBERT D. COLEMAN on behalf of B & D AIR CONDITIONING AND HEATING COMPANY did on or about February 14, 1983 but which was done in reliance upon WILLIAM R. FINCHER'S and YELLOW RIBBON ENTERPRISES' representations. WILLIAM R. FINCHER'S and YELLOW RIBBON ENTERPRISES' representations were false, were made with the intention of not fulfilling them, were made intentionally to induce ROBERT D. COLEMAN to execute the release, and to endorse a partial payment check in the amount of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) which had been marked "Full and Final Payment," and that ROBERT D. COLEMAN and B & D AIR CONDITIONING AND HEATING COMPANY relied upon such false representations in executing the release and check. Execution of the release and check by B & D AIR CONDITIONING AND HEATING COMPANY was, accordingly, induced by fraud.

There was lengthy testimony from Donald Partridge as to the course of dealings between B & D Air Conditioning and

Heating, and Fincher. He testified to all of the work performed by his company and his understanding of the contract between the parties. He also testified to the explanation given him when he questioned Fincher about the words "full and final payment" on the $5,000.00 check. There was, therefore, "some" evidence that:

> 1) appellants falsely represented to appellees that they would be paid in full $28,410.40, the amount due appellees as shown by invoices presented to appellants for payment, but in order to obtain the monies, appellants needed a signed release in advance;
>
> 2) appellees signed the release in reliance on this representation;
>
> 3) appellants knew this representation was false at the time it was made;
>
> 4) appellants made the representation with the intent that appellees rely and act on it,
>
> 5) which appellees did to their detriment.

Appellees' proof was sufficient to show actionable fraud in the inducement by appellants, which entitles them to rescission of the contract of release. *See Dallas Farm Mach. Co. v. Reaves*, 158 Tex. 1, 10, 307 S.W.2d 233, 238-39 (1957); *Burroughs Corp. v. Farmers Dairies*, 538 S.W.2d 809, 810 (Tex. Civ. App.--El Paso 1976, writ ref'd n.r.e.).

When there is fraud in the inducement to sign a contract, the injured party may elect damages on the contract or the equitable remedies of rescission or reformation, but the general principle is that there is less strictness in granting rescission or restitution. *Smith v. National Resort Communities, Inc.*, 585 S.W.2d 655,658 (Tex. 1979). A promise to perform an act in the future is a fraudulent representation when it is made with the purpose of deceiving and with no present intent to perform the

act. *Spoljaric v. Percival Tours, Inc.*[,] 708 S.W.2d 432, 434 (Tex. 1986). Intent may be inferred from circumstantial evidence, such as the party's acts at the time and after the representation is made. Even slight additional circumstantial evidence may be sufficient to support a finding of fraudulent intent. *Id.* at 435; *New Process Steel Corp. v. Steel Corp.*, 703 S.W.2d 209, 214 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

In a nonjury case, the trial court is the judge of the credibility of the witnesses and of the weight to be given their testimony, since it has the opportunity to observe the demeanor of the witnesses, and it may believe all, none, or part of the witnesses' testimony. *Fontner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 687 S.W.2d 8, 12 (Tex. App.--Dallas 1984, no writ); *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210, 213

(Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.).

We find there is legally sufficient evidence to support the trial court's finding of fact number 11, and that the trial court properly ruled the signed release was not binding. We overrule points of error two and three.

We affirm the judgment.]

MIRABAL, J., dissents.

MIRABAL, Justice, dissenting.

The following hypothetical illustrates the effect of the majority's ruling today:

Assume plaintiff files suit against named defendants "ABC Partnership, B, individually and C, individually" (without naming A, individually, as a defendant). Assume also that the petition states that ABC Partnership can be served with process by serving any of its partners, A, B, or C, and that the constable serves A with the citation that is addressed "TO: ABC

Partnership." Assume further that the petition's concluding prayer seeks judgment against "all defendants, jointly and severally" or against "ABC Partnership, B and C, jointly and severally." Assume answers are filed on behalf of ABC Partnership, B and C, and that A never appears in the case. According to the majority opinion in the present case, judgment could properly be entered against A, individually, even though A was not named as a defendant. A logical extension of the majority's opinion is that the plaintiff could take a default judgment against A, individually, nonsuit the other defendants, and have a final judgment against A, even though A was never individually named as a defendant.

I respectfully disagree and dissent. I do not believe a reasonable person in A's shoes would be put on notice that he is being sued *individually* when he gets served

with a citation addressed "TO: ABC Partnership," along with a petition that does not name A, individually, as a defendant.

In my opinion, in the present case, the trial court erred when it granted judgment against Fincher *individually*, when Fincher was not named *individually* as a defendant until *after* the trial was completed.

A petition against a partnership should state the names of all the partners in order that judgments may be obtained against them individually. *Texaco, Inc. v. Wolfe*, 601 S.W.2d 737, 740 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.). Further, a petition should allege the capacity of a defendant sued other than as an individual. *Id.*; 2 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 6.04.2 (rev. 1982).

In the present case, the evidence showed that Yellow Ribbon was a Texas general partnership composed of two partners, Fincher, individually, and Fincher as Trustee for a corporation. The only *partner* named as a defendant in appellee's petition was "Fincher, Trustee".

It is true that the factual allegations in the pleadings state, and the proof showed, that Fincher was a general partner of Yellow Ribbon, that Yellow Ribbon and Fincher owned the involved apartment complex, and that Fincher made certain representations and agreements. It is also true that all partners are jointly and severally liable for the debts of the partnership, and that citation served on a member of a partnership generally authorizes judgment against the partnership and the partner actually served. TEX.REV.CIV.STAT. ANN. art. 6132b, §§ 15, 16(1) (Vernon Supp.1991); TEX.CIV.PRAC. & REM.CODE ANN. §

17.022 (Vernon 1986). However, we have not been shown, nor can we find, any case holding that a partner, not named in a suit as a *defendant*, can have a valid judgment entered against him. Fincher was named as a defendant only in his capacity as "Trustee." A judgment against a trustee in his representative capacity is collectible by execution against the trust property, not against the trustee's personal assets. TEX.PROP.CODE ANN. § 114.084 (Vernon 1984).

I would hold the post trial amendment adding Fincher, *individually*, as a party defendant, when he did not participate in the trial or file any pleadings in the case *individually*, did not authorize a judgment against Fincher, *individually*.

I would sustain point of error one. I would reverse and render a take-nothing judgment as to appellant William R. Fincher, individually, and affirm the judgment in all other respects.

CAUSE NO. 83-40243

MISCHER ENTERPRISES, INC.	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
B. & D. AIR CONDITIONING AND HEATING COMPANY; D.L. PARTRIDGE; R.D. COLEMAN; A.B. MAY; and LANDSCO PROPERTIES	§	215TH JUDICIAL DISTRICT

TRIAL BEFORE THE COURT

BE IT REMEMBERED that on the 16th day of June, A.D., 1989, came on to be heard the above styled and numbered cause before the Honorable Eugene Chambers, Judge, Presiding, of the 215th Judicial District Court of Harris County, Texas.

The following proceedings were held in connection with the above styled and numbered cause, viz:

A P P E A R A N C E S:

FOR THE PLAINTIFF, MISCHER ENTERPRISES, INC.:

Ross, Banks, May, Crone & Cavin
9 Greenway Plaza
20th Floor
Houston, Texas 77046

By: Ms. Dona Szak

FOR THE DEFENDANTS, B & D AIR CONDITIONING AND HEATING, PAUL FRANCIS [sic] COMPANY, DONALD L. PARTRIDGE:

Schleider & Francis
2001 Kirby Drive
Suite 1214
Houston, Texas 77019

By: Mr. Paul Francis

FOR THE DEFENDANTS, YELLOW RIBBON ENTERPRISES, AND WILLIAM R. FINCHER, TRUSTEE:

Mr. Toby Bonds
10200 Old Katy Road
Suite 301
Houston, Texas 77043

(Excerpt from the transcript of the trial, page 131, setting forth the state court's ruling on the parties' claims).

THE COURT'S ORDER

I'm going to give a Judgment in favor of Mischer against B & D for the amount they asked for, $15,127.97, plus attorney's fees for $4,500.00, plus costs.

And Judgment for B & D Air Conditioning against Yellow Ribbon for $23,410.40, plus attorney's fees, plus $4,500.00, plus $3,000.00 for the Court of Appeals, $3,000.00 for Supreme Court.

Draw me an Order.

****

NO. 83-40243

MISCHER ENTERPRISES, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
VS.	§	
B & D AIR CONDITIONING AND HEATING COMPANY, DONALD L. PARTRIDGE, R.D. COLEMAN, ALAN B. MAY, LANDSCO PROPERTIES, INC., YELLOW RIBBON ENTERPRISES, and WILLIAM R. FINCHER, INDIVIDUALLY AND AS TRUSTEE,	§	HARRIS COUNTY, TEXAS
Defendants	§	215TH JUDICIAL DISTRICT

J U D G M E N T

BE IT REMEMBERED that on June 16, 1989 came to be heard trial of the above referenced cause, when came the plaintiff, MISCHER ENTERPRISES, INC., by and through its attorney of record, and B & D AIR CONDITIONING AND HEATING COMPANY, R. D. COLEMAN, and DONALD L. PARTRIDGE, in person and by and through their attorney of record, and YELLOW RIBBON ENTERPRISES and

WILLIAM R. FINCHER, in person and by and through their attorney of record. All persons appearing announced ready for trial. ALAN B. MAY and LANDSCO PROPERTIES, INC., although duly notified, failed to appear. A jury having been waived, the case proceeded to trial before the Court.

At the conclusion of all of the evidence, the parties each moved for judgment in their favor and B & D AIR CONDITIONING AND HEATING and DONALD L. PARTRIDGE moved for and the Court granted them leave to make a trial amendment to seek recovery on their claims against WILLIAM R. FINCHER, INDIVIDUALLY as well as TRUSTEE. The Court, having heard the evidence, is of the opinion that B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE, R. D. COLEMAN, ALAN B. MAY and LANDSCO PROPERTIES, INC. are jointly and severally indebted to MISCHER ENTERPRISES, INC. in the sum of $15,127.79,

together with pre and post-judgment interest and attorney's fees. The Court is further of the opinion that YELLOW RIBBON ENTERPRISES, WILLIAM R. FINCHER, INDIVIDUALLY and as TRUSTEE, ALAN B. MAY, and LANDSCO PROPERTIES, INC. are jointly and severally indebted to B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE in the sum of $23,410.40, together with pre and post-judgment interest and attorney's fees, and that B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE are entitled to foreclosure of a mechanics and material-men's lien on the property of YELLOW RIBBON ENTERPRISES and WILLIAM R. FINCHER described below.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED, that plaintiff, MISCHER ENTERPRISES, INC., do have and recover of and from the defendants, B & D AIR CONDITIONING AND HEATING COMPANY, DONALD L.

PARTRIDGE, R. D. COLEMAN, ALAN B. MAY, and LANDSCO PROPERTIES, INC., jointly and severally, judgment in the sum of $15,127.79, together with interest thereon at the rate of 6% per annum from and after April 21, 1983 until date of judgment, and at the rate of 10% per annum from and after date of judgment until paid; and for attorney's fees in the sum of $5,000.00, together with interest thereon at the rate of 10% per annum from and after date of judgment until paid.

IT IS, FURTHER, ORDERED, ADJUDGED, and DECREED, that B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE have judgment of and from YELLOW RIBBON ENTERPRISES and WILLIAM R. FINCHER, INDIVIDUALLY and as TRUSTEE, jointly and severally, int [sic] the sum of $23,410.40, together with interest thereon at the rate of 6% per annum from and after August 31, 1983 until date of judgment, and at the

rate of 10% per annum from and after date of judgment until paid; and for attorney's fees for trial of this cause in the sum of $4,500.00, together with interest thereon at the rate of 10% per annum from and after date of judgment until paid; and further for attorney's fees in the sum of $3,000.00 in the event the case is appealed to the Court of Appeals; and further for attorney's fees in the sum of $3,000.00 if a writ of error is filed with the Supreme Court of Texas.

All costs of Court incurred by MISCHER ENTERPRISES are assessed jointly and severally against B & D AIR CONDITIONING AND HEATING COMPANY, DONALD L. PARTRIDGE, R. D. COLEMAN, ALAN B. MAY and LANDSCO PROPERTIES, INC., together with interest thereon at the rate of 10% per annum from and after the date of judgment until paid.

All costs of Court incurred by B & D AIR CONDITIONING AND HEATING COMPANY,

DONALD L. PARTRIDGE and R. D. COLEMAN, including any liability they have to pay costs to MISCHER ENTERPRISES, INC., are hereby assessed jointly and severally against YELLOW RIBBON ENTERPRISES, WILLIAM R. FINCHER, INDIVIDUALLY and as TRUSTEE, ALAN B. MAY, and LANDSCO PROPERTIES, INC., together with interest thereon at the rate of 10% per annum from and after the date of judgment until paid.

IT IS, FURTHER, ORDERED, ADJUDGED, and DECREED, that the lien of B & d [sic] AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE recorded under Clerk's File No. J038962 and under Film Code Number 052-89-0565 of the Real Property Records of Harris County, Texas, in the following described property be, and is hereby foreclosed:

> A tract of land containing 2.401 Acres out of the F. Martin Survey, A-551, Harris County, Texas, said tract being more particularly described by metes and bounds as follows:

BEST AVAILABLE COPY

BEGINNING at I. R. in the west line of South Shaver (120' ROW) for the SE corner, said point being N 0 degrees 06' W along the west line of South Shaver, 506.40 feet from the NW corner of South Shaver and Viceroy Drive (60' ROW);

THENCE, N 0 degrees 06' W along the west line of South Shaver, 523.02 feet to an I. R. for the NE corner;

THENCE, N 89 degrees 58' 30" W along a fence line 200.00 feet to an I. R. for the NW corner;

THENCE, S 0 degrees 06' E, along a wood fence line 523.02 feet to an I. R. for the SW corner;

THENCE, 89 degrees 58' 30" E, along a fence line 200.00 feet to the PLACE OF BEGINNING.

and an order of sale shall issue to any sheriff or constable within the State of Texas directing him to seize and sell said property as under execution in satisfaction of the judgment; and if the property can not be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to take the money or any

balance thereon remaining unpaid out of any other property of said defendants, as in the case of ordinary executions; and this order shall have all of the force and effective writ of possession as between the parties to this foreclosure suit and any person claiming under the defendants to such suit by any right acquired pending such suit; for all of which let execution issue.

All relief not expressly granted is DENIED.

SIGNED, on this 31st day of August, 1989.

/s/ Eugene Chambers
JUDGE PRESIDING

APPROVED AS TO FORM:

ROSS, BANKS, MAY, CRON & CAVIN

By: /s/
DONA SZAK

Texas State Bar No.: 19597500
Coastal Tower, 12th Floor
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-1200

ATTORNEYS FOR MISCHER
ENTERPRISES, INC.

/s/
PAUL S. FRANCIS

Texas State Bar No.: 07359500
The Lyric Centre
440 Louisiana, Suite 2350
Houston, Texas 77002-1683
(713) 223-1415

ATTORNEY FOR B & D AIR
CONDITIONING AND HEATING
COMPANY and DONALD L. PARTRIDGE.

TOBY BOND [not signed]

Texas State Bar No.:
8705 Katy Freeway
Houston, Texas 77024
(713)

ATTORNEY FOR YELLOW RIBBON
ENTERPRISES and WILLIAM R.
FINCHER, INDIVIDUALLY [sic]
AND AS TRUSTEE.

NO. 83-40243

MISCHER ENTERPRISES, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff	§	
VS.	§	HARRIS COUNTY, TEXAS
B & D AIR CONDITIONING AND HEATING COMPANY, ET AL,	§	
Defendants	§	215TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above captioned cause came on for trial before the Court without a jury on June 16, 1989. MISCHER ENTERPRISES, INC. by and through its attorney of record, and B & D AIR CONDITIONING AND HEATING COMPANY, and DONALD L. PARTRIDGE in person and by and through their attorney of record, and YELLOW RIBBON ENTERPRISES and WILLIAM R. FINCHER in person and by and through their attorney of record appeared. All such persons appeared and announced ready for trial. ALAN B. MAY and LANDSCO PROPERTIES, INC., although duly notified, failed to

appear. After considering the pleadings, the evidence, and the arguments, the Court in response to a request from defendants, YELLOW RIBBON ENTERPRISES and WILLIAM R. FINCHER, makes its findings of facts and conclusions of law as follows:

FINDINGS OF FACT

1. On or about September 1, 1982, YELLOW RIBBON ENTERPRISES, by and through its general partner WILLIAM R. FINCHER, entered into an agreement with ALAN B. MAY to engage ALAN B. MAY to act as a general contractor to reconstruct and rehabilitate certain apartment units located [at] 3920-3860 South Shaver Street in Houston, Texas, known as the ARLINGTON ARMS APARTMENTS, which were situated on the real property, more particularly described in Exhibit "A" attached hereto.

2. YELLOW RIBBON ENTERPRISES and WILLIAM R. FINCHER were the owners of said real property and YELLOW RIBBON ENTERPRISES

was a general partnership of which WILLIAM R. FINCHER was one of the general partners.

3. ALAN B. MAY did business on occasion as LANDSCO PROPERTIES, INC. with respect to the subject transactions.

4. ALAN B. MAY contracted with B & D AIR CONDITIONING AND HEATING COMPANY, and its proprietor DONALD L. PARTRIDGE were the partners [sic], to install air conditioning units in the project and to furnish air conditioning units, parts, ducting, and other materials necessary to recondition air conditioning units in the project or, where necessary, to replace units that were not able to be reconditioned.

5. B & D AIR CONDITIONING AND HEATING COMPANY'S work commenced in late August, 1982 or early September, 1982 and continued thereafter at various times until on or about June 1, 1983.

6. MISCHER ENTERPRISES, INC. furnished materials to B & D AIR CONDITIONING

AND HEATING COMPANY which were thereafter incorporated into the ARLINGTON ARMS construction project.

7. On or about January 18, 1983, LANDSCO PROPERTIES, INC. and ALAN B. MAY guaranteed payment for the air conditioning materials supplied by MISCHER ENTERPRISES, INC. to B & D AIR CONDITIONING AND HEATING COMPANY for the project up to the total sum of TWENTY-EIGHT THOUSAND FIVE HUNDRED SIXTY-NINE AND 05/100 DOLLARS ($28,569.05).

8. MISCHER ENTERPRISES, INC. provided air conditioning units and materials which were used on the project and the total amount of the unpaid balance due and owing to MISCHER ENTERPRISES, INC. for said materials is FIFTEEN THOUSAND ONE HUNDRED TWENTY-SEVEN AND 79/100 DOLLARS ($15,127.79), which were furnished in January and February, 1983 [sic] and which amount was due and owing by not later than April 21, 1983.

9. The work done by B & D AIR CONDITIONING AND HEATING COMPANY on the project was done with the full knowledge and consent of WILLIAM R. FINCHER and YELLOW RIBBON ENTERPRISES. At some point during the project ALAN B. MAY and LANDSCO PROPERTIES INC. were discharged by WILLIAM R. FINCHER as the contractor. Thereafter, WILLIAM R. FINCHER and YELLOW RIBBON ENTERPRISES requested B & D AIR CONDITIONING AND HEATING COMPANY to continue its work on the project and to continue to provide and install air conditioning units and equipment and materials on the project, which work was done, was knowingly accepted by and substantially benefited WILLIAM R. FINCHER and YELLOW RIBBON ENTERPRISES.

10. ALAN B. MAY, LANDSCO PROPERTIES, INC., WILLIAM R. FINCHER, and YELLOW RIBBON ENTERPRISES promised and agreed to pay B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE a total amount of

TWENTY-EIGHT THOUSAND FOUR HUNDRED TEN AND 40/100 DOLLARS ($28,410.40), being the balance due to them for the work performed and materials supplied to the project but of which only the amount of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) was paid, leaving an unpaid balance of TWENTY-THREE THOUSAND FOUR HUNDRED TEN AND 40/100 DOLLARS ($23,410.40), which became due and owing by not later than August 31, 1983.

11. WILLIAM R. FINCHER and YELLOW RIBBON ENTERPRISES falsely represented to B & D AIR CONDITIONING AND HEATING COMPANY that B & D AIR CONDITIONING AND HEATING COMPANY would be paid the full TWENTY-EIGHT THOUSAND FOUR HUNDRED TEN AND 40/100 DOLLARS ($28,410.40) due to them but that in order for WILLIAM R. FINCHER to obtain the monies necessary to make such payment B & D AIR CONDITIONING AND HEATING COMPANY would have to sign a release in advance, which ROBERT D. COLEMAN on behalf of B & D

AIR CONDITIONING AND HEATING COMPANY did on or about February 14, 1983 but which was done in reliance upon WILLIAM R. FINCHER'S and YELLOW RIBBON ENTERPRISES' representations. WILLIAM R. FINCHER'S and YELLOW RIBBON ENTERPRISES' representations were false, were made with the intention of not fulfilling them, were made intentionally to induce ROBERT D. COLEMAN to execute the release, and to endorse a partial payment check in the amount of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) which had been marked "Full and Final Payment," and that ROBERT D. COLEMAN and B & D AIR CONDITIONING AND HEATING COMPANY relied upon such false representations in executing the release and check. Execution of the release and check by B & D AIR CONDITIONING AND HEATING COMPANY was, accordingly, induced by fraud.

12. The reasonable and fair value of the labor performed and the materials

provided by B & D AIR CONDITIONING AND HEATING COMPANY to the subject project, and for which they have not been paid, were worth at least TWENTY-THREE THOUSAND FOUR HUNDRED TEN AND 40/100 DOLLARS ($23,410.40).

13. The reasonable attorneys' fees incurred by MISCHER ENTERPRISES, INC. in prosecuting its claims in this action are FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00).

14. The reasonable attorneys' fees incurred by B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE are FOUR THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($4,500.00) through the trial of this action, and will be THREE THOUSAND AND NO/100 DOLLARS ($3,000.00) in the event the case is appealed to a Court of Appeals, and an additional THREE THOUSAND AND NO/100 DOLLARS ($3,000.00) if a writ of error is filed with the Supreme Court of Texas.

15. That B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE gave notice to YELLOW RIBBON ENTERPRISES, WILLIAM R. FINCHER, ALAN B. MAY, and LANDSCO PROPERTIES, INC. pursuant to Articles 5452-5472(d) of the Revised Civil Statutes of Texas on July 12, 1983 of the amount unpaid to them for labor and materials furnished through June 1, 1983 on the subject project.

16. DONALD L. PARTRIDGE and B & D AIR CONDITIONING AND HEATING COMPANY perfected their mechanics and materialmen's lien for the amount of TWENTY-THREE THOUSAND FOUR HUNDRED FIVE AND NO/100 DOLLARS ($23,405.00) by filing a Lien Affidavit and Claim among the Real Property Records of Harris County, Texas on July 12, 1983, under Clerk's File No. J038962, and Film Code No. 052-89-0565.

CONCLUSIONS OF LAW

1. B & D AIR CONDITIONING AND HEATING COMPANY, DONALD L. PARTRIDGE, and ROBERT D. COLEMAN breached their agreement to pay MISCHER ENTERPRISES, INC. for the air conditioning, heating units, parts, supplies, and goods and materials purchased from MISCHER ENTERPRISES, INC.

2. ALAN B. MAY and LANDSCO PROPERTIES, INC. breached their agreement to guarantee payment to MISCHER ENTERPRISES, INC. of all sums due and owing by B & D AIR CONDITIONING AND HEATING COMPANY and which remained unpaid.

3. B & D AIR CONDITIONING AND HEATING COMPANY, DONALD L. PARTRIDGE, ROBERT D. COLEMAN, ALAN B. MAY, and LANDSCO PROPERTIES, INC. are jointly and severally liable to MISCHER ENTERPRISES, INC. in the sum of FIFTEEN THOUSAND ONE HUNDRED TWENTY-SEVEN AND 79/100 DOLLARS ($15,127.79), together with interest thereon at the rate of SIX PERCENT (6%) per

annum from and after April 21, 1983 until date of judgment, and thereafter at the rate of TEN PERCENT (10%) per annum until paid, and for attorneys' fees in the sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00), together with interest thereon at the rate of TEN PERCENT (10%) per annum from and after the date of judgment until paid.

4. ALAN B. MAY, LANDSCO PROPERTIES, INC., WILLIAM R. FINCHER, and YELLOW RIBBON ENTERPRISES breached their agreements with B & D AIR CONDITIONING AND HEATING COMPANY, and DONALD L. PARTRIDGE to pay for the labor performed and materials supplied by them to the ARLINGTON ARMS construction project.

5. YELLOW RIBBON ENTERPRISES and WILLIAM R. FINCHER are jointly and severally liable under the principals [sic] of Quantum Meruit to B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L.

PARTRIDGE for the reasonable value of the services and materials provided for which they were not paid.

6. ALAN B. MAY, LANDSCO PROPERTIES, INC., WILLIAM R. FINCHER, and YELLOW RIBBON ENTERPRISES and its general partner WILLIAM R. FINCHER are jointly and severally liable to B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE in the sum of TWENTY-THREE THOUSAND FOUR HUNDRED TEN AND 40/100 DOLLARS ($23,410.40), together with interest thereon at the rate of SIX PERCENT (6%) per annum from and after August 31, 1983 until the date of this judgment, and at the rate of TEN PERCENT (10%) per annum thereafter until paid, and for attorneys' fees through the trial of this cause in the sum of FOUR THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($4,500.00), together with interest thereon at the rate of TEN PERCENT (10%) per annum from and after the date of judgment until paid, and,

further, for attorneys' fees in the sum of THREE THOUSAND AND NO/100 DOLLARS ($3,000.00) in the event the case is appealed to a Court of Appeals, and, further, for attorneys' fees in the sum of THREE THOUSAND AND NO/100 DOLLARS ($3,000.00) if a writ of error is filed by any party with the Supreme Court of Texas.

7. B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE have a valid mechanic's and materialmen's lien on the property described in Exhibit "A" attached hereto, which lien was perfected by the filing of the Lien Affidavit and Claim on July 12, 1983 under Clerk's File No. J038962.

8. B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE are entitled to judicial foreclosure upon the property described in Exhibit "A" attached hereto to satisfy the amount of the judgment due and owing to them.

SIGNED, this 28th day of September, 1989.

/s/ Eugene Chambers
JUDGE PRESIDING

A tract of land containing 2.401 Acres out of the F. Martin Survey, A-551, Harris County, Texas, said tract being more particularly described by metes and bounds as follows:

Beginning at an I. R. in the west line of South Shaver (120' ROW) for the SE corner, said point being N 0° 06' W, along the west line of South Shaver, 506.40 feet from the NW corner of South Shaver and Viceroy Drive (60' ROW);

THENCE N 0° 06' W along the west line of South Shaver, 523.02 feet to an I. R. for the NE corner;

THENCE N 89° 58'30" W along a fence line 200.00 feet to an I. R. for the NW corner;

THENCE S 0° 06' E, along a wood fence line 523.02 feet to an I.R. for the SW corner;

THENCE S 89° 58'30" E., along a fence line, 200.00 feet to the PLACE OF BEGINNING.

EXHIBIT "A"

In The

Court of Appeals

For The

First District of Texas

NO. 01-89-01246-CV

WILLIAM R. FINCHER, INDIVIDUALLY AND AS TRUSTEE AND YELLOW RIBBON ENTERPRISES, APPELLANTS

VS.

B & D AIR CONDITIONING ND [SIC] HEATING COMPANY AND DONALD L. PARTRIDGE, APPELLEES

MOTION FOR REHEARING

On this day came on to be heard appellants' motion for rehearing. And such motion is hereby **OVERRULED.**

It is so ordered.

PER CURIAM

Panel consisting of Justices Mirabal, Wilson & Price.

Order entered September 26, 1991.

Kathryn Cox, Clerk of the Court.

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 26, 1992

Mr. Robert A. Sherman
Morris & Campbell
600 Jefferson, Suite 1617
Houston, Texas 77002

Mr. Paul S. Francis
Elkins & Yount, P.C.
1100 Louisiana, Suite 4800
Houston, Texas 77002

RE: Case No. D-1795

Style: WILLIAM R. FINCHER, INDIVIDUALLY AND AS TRUSTEE, AND YELLOW RIBBON ENTERPRISES v. B & D AIR CONDITIONING AND HEATING COMPANY and DONALD L. PARTRIDGE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk

by /s/
Courtland Crocker, Deputy